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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Case No. 622

JONIE GARDNER LEE, *Petitioner*

v.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED SEPTEMBER 29, 1962

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your Petitioner, Jonie Gardner Lee, respectfully shows unto the Court that he was the defendant in the United States Circuit Court of Appeals, wherein the United States was the Complainant, case No. 8615, which case had been regularly tried in the United States District Court of the United States, Eastern District of North Carolina, Raleigh Division, Criminal No. 47-61, when a Hearing was had before the Court without a jury, after which an appeal

was presented to the 4th Circuit Court of Appeals upon which an opinion and judgment of the Court was entered against Petitioner under date of September 29, 1962, copy of which opinion of said Circuit Court of Appeals is set out in the Appendix hereof and made part of this Petition. App. 3a.

JURISDICTION

The Jurisdiction of this Court is invoked under the provisions of Title 28, subsection (b), sec. 288 of the United States Code Annotated. (Vol. 54 American Jurisprudence, p. 877).

Extension of time to file Petition for Certiorari by Chief Justice Warren, 7 Nov. 28, 1962 (inc.). App. 2a.

THE QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals, in its decision of September 29, 1962, so far depart from the accepted and usual course of judicial procedure, or so far sanction such departure, as to call for an exercise of this Court's Power of Supervision?

2. Did the District Court and the Circuit Court of Appeals for the Fourth Circuit, so interpret Rule 41(e) and Local Rule 3, in their respective capacities, as to deprive petitioner of his Constitutional rights against wrongful and unreasonable trespass and seizure of his private property, at his place of residence, without first obtaining a search warrant, so as to violate the Fourth Amendment to the Constitution of the United States, and thereby deprive petitioner of his right to be free from such trespass?

3. Was the evidence produced by the United States at Petitioner's trial in the District Court (the contents of a locked room in Petitioner's residence) illegally obtained and should said evidence so obtained, without a search warrant, have been suppressed upon Petitioner's Motion at his Trial in the District Court?

4. Did Rule 41(e) of the Federal Rules of Criminal Procedure and Rule 3 of the District Court bar Petitioner from his right to suppress the evidence submitted against Petitioner at his trial in the United States District Court?

STATEMENT OF FACTS

Counsel for Petitioner has examined and adopts the "*Statement of Facts*" filed by Petitioner, with and considered by the Fourth Circuit Court of Appeals and has also compared this statement factually with that submitted by Attorneys for the United States, in the Court of Appeals, and has also compared it with the Findings of Fact by the Fourth Circuit, and finds no substantial factual variance between them. Counsel also believes the certified testimony at the trial conforms to the statement in Petitioner's "Statement of Facts", reading as follows:

"STATEMENT OF FACTS

The defendant, Jonie Gardner Lee, was arrested in the living room of his home on the night of February 16, 1962, in the presence of his wife. The offense with which he was charged had allegedly taken place at a period from 1955 to 1960 and had *terminated nearly a year before*. It had no connection with any 1961 violation of the Internal Revenue Statutes, but was an entirely separate and distinct offense with no connection with any then present activity and the defendant. No warrant was obtained for the search of his premises and there is no evidence that the officers' purpose upon his premises was for anything other than to make an arrest for an alleged criminal act whose termination was a year in the past. The arrest was made without incident in the living room and without the discovery of any incriminating evidence of any kind.

After the arrest had been completed, Investigator Vassar went through the defendant's house to the back door for the alleged purpose of permitting the entry of Investigator Blake. No logical reason was made to appear for the necessity of admitting Blake although there is testimony, (Record Page 5-6) that his pres-

ence was desired for the purpose of helping secure the prisoner; however, there is no evidence or even intimation that the prisoner made any resistance or in any other manner sought to elude capture, to escape, or to impede the officers in any manner, nor is there any evidence that he was a man from whom resistance might be feared.

While going through the house and in particular through the kitchen to open the back door Investigator Vassar testified that he saw three sixty pound bales of sugar and two cases of half gallon fruit jars and that thereupon suspecting that these materials were there for an illegal purpose and determining thereupon to make a further search of the premises, he had other investigators *returned to the living room where the defendant and his wife were, search the defendant* and took from him his keys. The investigators then opened a room which was locked and in one room found a distillery set up consisting of a two hundred gallon copper still, pot type, fifteen fifty-five gallon wood fermenter barrels, and other apparatus, including some cooler barrels and two sleeve condensers and one gallon of non-tax paid whiskey.

None of the material was visible from the living room, not even the sugar and jars in the kitchen. The entry into the kitchen was not necessary to make the arrest or to secure the person of the defendant, (Record Page 7), or to prevent his escape, but was made merely to suit the personal whim of the investigators, or the convenience of one of them. The resulting discoveries which formed the basis for the indictment in the instant case were, as has been previously stated, in no way connected with the indictment which led to the original arrest, but constituted matter unconnected in time or in any other manner." (Italics supplied)

PETITIONER'S MOTION TO SUPPRESS EVIDENCE SHOULD HAVE BEEN GRANTED

Points Nos. 1 and 2 raise the vital question of a departure by the District Court, and the Court of Appeals, when Petitioner's motion to suppress evidence in the District Court was overruled both as not timely filed and "on the

merits", whereby Rule 41(e) of the Federal Rules of Criminal Procedure (App. 1a) made subservient to Rule 3 of the local rules of the District Court of the Eastern District of North Carolina as to time to file appeal. (App. 3a).

Plaintiff's Motion to suppress vital evidence was construed by the District Court to permit prejudicial evidence obtained by an illegal, wrongful and unreasonable search and seizure of personal belongings of Petitioner found in a locked room in his residence when such search and seizure violated Petitioner's Constitutional rights under the 4th Amendment to the Constitution. See Statement of Facts, p. 3, *supra*.

Rule 41(e) of the Federal Rules of Criminal Procedure (App. 1a), was binding upon the parties and this rule fixed no 5 day time restriction, upon the date of filing a Motion to Suppress evidence. Obviously, local rule 3 (App. 1a) cannot be valid if it grants or denies the effectiveness of Rule 41(e).

Rule 41(e) provides (App. 1a) specifically that a "Motion (to suppress evidence) shall be made "before trial or hearing," and local rule 3—without any rule-making power so to do, adopted local rule 3, inconsistent with 41(e) of the Federal Rules of Criminal Procedure, said rule 3, being an unauthorized assumption of rule-making power. Under Rule 41(e) of the Federal Rules of Criminal Procedure a Motion to Supress may and *must be filed in the District Court before trial.* Certainly the Motion of Petitioner to Suppress Evidence filed in the District Court was, admittedly, filed *before trial,* which made the filing date strictly in conformity with rule 41(e) of the Federal Rules of Criminal Procedure and the conclusion cannot be avoided that neither the Circuit Court of Appeals nor this Court ever authorized the District Court to enlarge the time from a permissive date "before trial" to a period of "five days" before trial. To interpret the language of rule 41(e)

other than to reach the conclusion, herein set out, would be to allow the District Court to make rules and restrictions upon vital motions required of a defendant, within the power of the District Judge rather than within the paramount power of the Supreme Court.

Further, rule 41(e) was adopted in its present form, as was its companion, rule 47, in order to avoid the harshness of prior inadequate protective procedures which this Court desired to strengthen when the Federal Rules of Criminal Procedures were adopted.

It is true, as argued by Government Counsel in their brief before the 4th Court of Appeals, that Petitioner's counsel cross-examined Government witnesses but that fact is no support to his present contentions. The answer to this conclusion is simple: the cross-examination was designed to remove the illegality of the use of the seized testimony, described in Petitioner's Motion to Suppress, which evidence was erroneously construed by the Circuit Court of Appeals when it overruled Petitioner's Motion to Suppress, holding not only that the motion was not filed on time, but also, notwithstanding the record and the evidence of the Government's own witnesses, erroneously denied the Motion "on the merits."

Petitioner was prejudiced by the Circuit Court decision allowing local district Rule to modify, amend, restrict and limit the effect of Rule 41(e), and it follows, beyond doubt or quibbling, that such decision was "inconsistent" with Rule 41(e) and, therefore, void and that Petitioner's Motion to Suppress should have been granted and not overruled.

Contrary to the contention of the United States in the trial court and on appeal in the Circuit Court of Appeals that Criminal Rule 57 allows the District Court to modify or enlarge rules by which it must live, Rule 57 adds weight to our contention, by requiring that all District Court rules

shall be "consistent" with the Federal Rules of Criminal Procedure.

Counsel for Petitioner has carefully read the argument and citations offered the Circuit Court of Appeals by the United States and believe that they do not support the contentions by the United States with respect to Petitioner's Motion to Suppress but do support our contention that the Motion to Suppress should have been granted and the evidence obtained by the wrongful search and seizure suppressed.

Had Petitioner's Motion to Suppress been granted, as we will further demonstrate herein, there would have been no hearing and Petitioner would not have been put to trial but released and the indictment quashed.

The search of Petitioner's locked room—entered by agents of the United States, after forcibly searching petitioner and finding a bunch of keys in his pocket—and after searching said room, without a search warrant, was clearly unconstitutional and wrongful and cannot be excused by the existence of any emergency justifying a seizure and search *without* a search warrant.

Disregarding all immunities of Respondent and with no emergency requiring a search, the agents of the United States searched *throughout* Petitioner's residence with keys abstracted from his pockets, which search was made without any pre-existing ground therefor and after his arrest upon another charge in no way connected with the subsequent indictment for conspiracy as admitted by the agents of the United States who furnished all the evidence in its support. See Statement of Facts p. 3, *supra*.

In the case of *Harris* v. *United States*, 331 U.S. 145, the Court said in quoting *Agnello* v. *United States*, 269 U.S. 30, 70 L. ed. 148, "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is

made in order to find and seize things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted." Thus it becomes crystal clear that in the *Harris* case, and in the *Agnello* case, the search was justified, only because it was reasonably made to find and seize things connected with the crime, or as a means by which it was committed. This is emphasized by further statements in the Court's opinion contained in 91 L. ed page 1407 where the Court said the following, "Nor is this a case in which law enforcement officers have entered the premises ostensibly for the purpose of making an arrest, but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime." *Go-Bart Importing Company* v. *United States*, 282 U.S. 344; 75 L. ed. 374; *United States* v. *Lefkowitz*, 285 U.S. 452; 76 L. ed. 877.

For instance, in the *Go-Bart Importing Company* v. *United States*, 282 U.S. 344, the Court said, "The search was not an exploration but was specifically directed to means and instrumentalities by which the crime charged had been committed." No such condition existed in the instant case. Here the seizure of property was by reason of a forcible search of a defendant's pockets and the procurement of a key from their search enabling them to find private property in no way connected with the crime for which the Defendant, as Petitioner here, was arrested.

The U. S. agents testified (see Statement of Facts) that they found certain items of personal property, which they used effectively and that this seized property was used as a basis for proof that Petitioner was guilty of conspiring with others by having these articles in his possession.

An examination of the record (p.....) will show, beyond cavil, that Agents for the Government were not compelled to act by any of the varied emergency conditions which might have excused their forcible and unauthorized search. Permissible conditions which warrant such a seizure without a search warrant are:

1. That they had no time to procure a search warrant;

2. No sufficient reason is shown by the record excusing the officers from obtaining a search warrant;

3. Petitioner was not fleeing from his home or domicile, but had a permanent domicile in the premises, where the Agents had just searched him;

4. The contraband property, (if it were such in law), was not known to exist until "disclosed by an unwarranted search and seizure."

> *Jones* v. *U.S.*, 357 U.S. 403; *District of Columbia* v. *Little*, 339 U.S. 1; American Jurisprudence, Vol. 47, 1961 Supp. 56-57.

This Court has sustained searches and seizure of properties in some cases where the defendant did not establish that the premises constituted his private place of residence or his domicile, or a location which he was occupying as a home, in good faith.

This Court held that a tenant occupying an apartment, as his home, has the same right to protection as one using a residence he owns and occupies. *Jones* v. *United States*, 362 U.S. 257.

This Court only denies to a defendant the "necessary standing" as to his home-ownership and only allows him to claim the right of an unconstitutional search and seizure where he suffers a wrongful search and seizure and on this subject the Court said in the *Jones* case:

> "The settled doctrine is that objection to evidence obtained in violation of the Fourth Amendment may

be raised only by one who claims ownership and the right to possession of the premises searched or the property seized."

In the *Jeffers* case, *U.S.* v. *Jeffers*, 342 U.S. 948, the Court held that the seizure therein described was unlawful and wrongful and declared that the defendant who was using a room in a hotel, assigned to him, gave him the necessary "standing" to move for a suppression of the seized evidence where no search warrant existed.

Searches and seizures have been allowed by this Court only because the record showed that the seizure of things belonging to a defendant was in some way connected with a crime for which he was arrested, or as a means by which it was committed. Here the record shows that the search and seizure complained of were made to support or because of a previous and different charge.

The question of seizure of private property, without a search warrant, following a lawful arrest, was discussed in the case of *Abel* v. *United States*, 362 U.S. 329, This case involved a deportation case and involved a search without a search warrant. In effect, this decision of the Court, by Associate Justice Frankfurter, denied the right of search and seizure involving a private residence, indicating that it might be allowed in a case involving a deportation proceeding "where the arrest is made in order to find seized goods connected with 'a crime or its fruits.'"

An arrest of a defendant for one cause does not allow a search of his premises to secure proof of a possible violation of some other statute or law. *Rabinowitz* v. *U.S.*, 339 U.S. 56.

In the *Rabinowitz* case the officer, an agent of the United States, had a legal warrant but the seizure of private property without a search warrant was disapproved by this Court.

The above cited cases sustain our view that the mere fact that a defendant may be arrested on one charge does not warrant a search and seizure of personal property to prove another criminal charge, the second charge being a distinct violation from the arresting charge.

The search of Petitioner's premises without a search warrant and the seizure of prejudicial contraband articles from a locked room in Petitioner's residence, against his will, was a serious violation of Petitioner's rights under the Fourth Amendment to the Constitution of the United States and was contrary to the weight of authority from the lower Federal Courts and decisions of this Court.

The Fourth Amendment to the Constitution reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is believed by many jurists that the enactment of the Fourth Amendment to the Constitution was demanded by members of the Constitutional Convention with greater earnestness and insistence than any of the Ten Amendments to the Constitution. This was demanded by the people with such unanimity that the Constitution would never have been adopted, in the opinion of many, but for an agreement among the delegates that they would support the Fourth Amendment in their respective states.

A decision by His Honor, District Court Judge William B. Jones, just handed down during the last week, accords with our views in this case and cites the case of *McKnight against the United States*, in the United States Circuit Court of Appeals for the District of Columbia, 87 App. D.C. 151.

The McKnight case presents the views of the Court of Appeals after great research for and consideration of relevant decisions which case we respectfully cite as a current authority of great significance.

In disposing of the case of the *United States against Langhorne C. Rorer and others*, District Judge Jones said, among other things, that in suppressing the evidence he noted that "The F.B.I. Agents who made the night time raid had arrest warrants but no search warrants" hence the seizure of property as evidence was invalid and the four defendants before him were discharged.

In the case of *Gouled* v. *U.S.*, 255 U.S. 298, this Court said that a defendant's rights to be free from unreasonable searches and seizures:

> "Are to be regarded as the very essence of Constitutional liberty, and that the guaranty of them is as important as are the guaranties of other fundamental rights of the individual citizen."

The record in this case, as shown by petitioner's "Statement of Facts", disproves the existence of any of the conditions warranting search and seizure of defendant's property or to search the locked room in his residence. And we believe the decisions of this Court cited herein, represent the Court's settled and convinced purpose to maintain the rights of the citizen and to assure him full protection against unreasonable searches and seizures of his private residence, and property thereon, as occurred herein.

We quote from American Jurisprudence, Vol. 47—Chapter IV, *Wrongful and Unreasonable Searches and Seizures:*

> Section 16. Searches of dwelling Houses and Buildings.—The only legal means which can be employed to search the premises of a private individual is a search warrant. Neither a private person nor an officer may

break in on the privacy of a home and subject its occupants to the indignity of a search for evidences of crime without a legal warrant for that purpose, and the fact that such a search is made by an officer will not excuse it. Nor is belief, however well founded, that an article sought is concealed in a house sufficient to justify a search thereof without a warrant. Mere suspicion or hearsay that some sort of crime may have been committed in a house or that such house contains some evidence that a crime has been committed is not sufficient justification for a search without a warrant.

American Jurisprudence, Vol. 47, Pages 512 and 513.

CONCLUSION

In view of the long established principles declared by this Court, in many decisions, involving the sacred principles of personal liberty and freedom from an unjust use of government power, prohibited by the 4th Amendment to the Constitution, we urge that this Court issue its Writ of Certiorari to the U. S. Court of Appeals for the Fourth Circuit, commanding it to certify to this Court, the record of the above entitled case *No. 8615*, in said Circuit Court, for review, in order that ultimate justice may be done.

Respectfully submitted,

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APPENDIX

Rule 41(e), Federal Rules of Criminal Procedure, reads in part as follows:

> "The motion (to suppress evidence) shall be made before trial or hearing unless opportunity therefor did not exist and the defendant was not aware of the grounds for the motion . . ."

Rule 47, Federal Rules of Criminal Procedure, reads in part as follows:

> "It (a motion) shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit."

Rule 57(a), Federal Rules of Criminal Procedure, reads in part as follows:

> "Rules made by District Courts . . . for the conduct of criminal proceedings shall not be inconsistent with these rules." (b) "If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Local Criminal Rule 3 reads in part as follows:

> "Such motions (under Rule 41(e)) shall be filed with the Clerk and a copy served upon the United States Attorney, at least five days prior to the day of arraignment, and motion shall either set forth the grounds and authority for the motion or be accompanied by a brief substantiating the position of the movant. The Court may, however, in exceptional circumstances and for good cause shown, allow such motions to be made at a time later than that fixed by this rule."

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

JONIE GARDNER LEE, *Petitioner*

v.

UNITED STATES

Order Extending Time To File Petition For Writ of Certiorari

UPON CONSIDERATION OF THE APPLICATION OF COUNSEL FOR PETITIONER(S), It is ordered that the time for filing petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including November 28th, 1962.

/s/ EARL WARREN
Chief Justice of the United States

Dated this 23rd
day of October, 1962

UNITED STATES SUPREME COURT

JONIE GARDNER LEE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Extension of Time to File Petition for Certiorari

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. ALGERNON L. BUTLER, DISTRICT JUDGE.

(Argued June 8, 1962. Decided September 29, 1962.)

Before SOPER and HAYNSWORTH, Circuit Judges, and CRAVEN, District Judge.

William A. Taylor and John A. Wilkinson for Appellant, and Alton T. Cummings, Assistant United States Attorney, (Robert H. Cowen, United States Attorney, on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

In this appeal from a conviction under the Internal Revenue laws relating to intoxicating liquors, the question arises out of a denial of a motion to suppress evidence of the presence in the defendant's home of a still, contraband sugar and untaxed whisky. The motion was denied on its merits and upon the additional ground, that it was un-

timely under a local rule.[1] We needed not consider the validity of the local rule as here applied, for we find no illegality in the search.

Before the occurrence of any of the other events with which we are concerned, Jonie Gardner Lee was indicted by a federal grand jury for offenses under the Internal Revenue laws relating to whisky, and an arrest warrant issued from the court, Gardner being then at liberty. On February 16, 1961, three officers, armed with the warrant, went to the defendant's home to arrest him. One of them, Blake, was stationed at the rear of the residence, apparently for the purpose of guarding against an escape through the rear entrance, while the other two, Vassar and Richardson, approached the front door. The defendant responded to the knock at the front door, and the officers identified themselves and announced their purpose. The defendant unlatched the screen door and invited them into his livingroom. There Richardson read the warrant to the defendant, while Vassar, during or immediately after the reading of the warrant, proceeded to the rear door of the house to admit Blake, after which Vassar and Blake returned to the livingroom. On this mission, however, Vassar and Blake had noticed, in plain view in the kitchen, three 60-pound bales of sugar and, in another room, two cases of half gallon fruit jars and another 20 pounds of sugar, a total of 200 pounds. They had also tried the closed door to one of the rooms of the house and found that the door was locked.

After the defendant's arrest was effected and Vassar had returned to the livingroom with Blake, the defendant

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[1] The motion was filed the day before the trial. Though the motion had been prepared several weeks earlier, its filing the day before the trial was a literal, if ungenerous, compliance with the requirement of Rule 41(e) of the Federal Rules of Criminal Procedure. There was a local rule, however, requiring that such motions be filed at least five days before arraignment, though, for good cause shown, later filings may be allowed.

was searched. Some keys were found in his possession and, with one of them, the locked door was unlocked and opened. Within the room there was a 200-gallon still and associated equipment and one gallon of illicit whisky.

This discovery led to another indictment, in which the defendant was charged with the unlawful possession of the still and associated equipment, the sugar and the untaxed whisky.

In the trial on the second indictment, Lee's only defense was that evidence of his possession of the still and the contraband was inadmissible because it had been obtained in the course of an unlawful search. In support of this objection, the defendant contends that no search of his house was warranted by the arrest. He says the arrest warrant was related to offenses and transactions which had been completed, and the officers had no specific information that there was anything in the house related to or arising out of the earlier offenses. He thus reasons that any search whatever must have been a general one for evidence of the commission of some other crime than those charged in the earlier indictment, and that such a search was unreasonable and unlawful.

We find the contention unacceptable.

There is no question of the legality of the arrest or of the presence of the officers in the defendant's livingroom. Before gaining admission to the livingroom, they had properly identified themselves and announced their purpose of serving the arrest warrant and taking the defendant into custody, after which the defendant unlatched the screen door and invited them into his house. Once there, when the arrest was effected in the house, the officers had a perfect right to conduct a reasonable search of the premises for illegal whisky or other fruits of the earlier crimes. Indeed, the whisky that was found in the locked room may well have been among the fruits of the

earlier crimes, for the still that was found there was not yet completely set up.

Moreover, incident to the lawful arrest, the officers had a perfect right to take security measures against a rear door escape, and, having done so and after having effected the arrest in the house, there was nothing unreasonable or unlawful about the conduct of one of the officers in going to the rear of the house to admit his fellow or about the return of the two through the house to the livingroom. Passing through the house for that purpose only was not a search, and their observation of the sugar and the half gallon jars, all of which were in plain view, was not a search.[2] If Vassar went to the rear of the house for the dual purpose of admitting Blake and of searching to the extent that he could while serving his first purpose, the search was plainly not unreasonable.

Nor did the search become unreasonable when the locked door was opened with the aid of the key obtained from the defendant's person. Since everything else in the house was apparently open, the officers had every reason to believe that if any fruits of the earlier crimes were in the house, they would likely find them in the locked room. By that time, the officers also had probable cause to believe that an offense was then being committed in their presence, for the quantity of sugar they had observed was far in excess of that which one would expect to be on hand for domestic use in midwinter, far in advance of any season of canning or preserving fruits. Certainly, the possession of such a quantity of sugar by a known bootlegger, then being taken into custody on account of earlier offenses, and in association with his possession at the same time of two cases of half gallon fruit jars, furnishes strong reason for the belief by the officers that the defendant possessed the jars and the sugar with the intention of using them in violation of the revenue laws,

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[2] Peteway v. United States, 4 Cir., 261 F.2d 53.

and that, hence, his possession of them was a crime then being committed in their presence. The reasonable belief of the officers that an offense was then being committed in their presence furnished all the more reason to believe that contraband was to be found behind the locked door.

The use of any force in a search or the turning of any lock without the consent of the possessor is a circumstance which may bear heavily upon the reasonableness of the search. That was certainly true in Go-Bart Importing Company v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374. But there the fact that one of the defendants was compelled to open the desk and the safe was aggravated by other facts, for there the officers were acting upon an invalid arrest warrant which they misrepresented to be a search warrant. They had no reason to believe that contraband was within the room or any other offense was being committed in their presence, and the search that was conducted was a very extensive and general ransacking of the office and of the desk, the safe and the filing cases in it. Here, in contrast, there was no general rummaging through the defendant's personal papers or among his personal effects. The officers were looking only for additional contraband, and only contraband was seized. All that can be said in support of the contention that the search was unreasonable was that the lock was turned with a key which had been removed from the defendant's person after his lawful arrest. That fact alone does not warrant a conclusion that the search was unreasonable.[3] This case is not like Drayton v. United States,

[3] Martin v. United States, 5 Cir., 155 F.2d 503; and see United States v. Haith, 4 Cir., 297 F.2d 65. In Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453, the Court relied upon a finding that the defendant, after his arrest, succumbed to permissible persuasion and consented to the unlocking of the door to the inner room. There was no such consent, however, when, immediately after the arrest, the officers, demanded and obtained the keys to the tin boxes on the gasoline pumps, which they then unlocked and inventoried.

5 Cir., 205 F.2d 35, where the search was held unreasonable not just because the locked door was opened with a key which had been removed from the defendant's person, but because the locked room was far removed from the place of the arrest. Here, in contrast, the locked room was in close proximity to the room in which the arrest was effected and the entire house, in which only the defendant and his wife appeared to reside, was under the immediate control and possession of the defendant at the time of his arrest in it. The search did not extend over an unreasonable area,[4] as it did in Drayton.

It is true, of course, that officers effecting a lawful arrest have no right to set about in a general search for evidence of other crime than that for which the arrest was made, and they cannot use a lawful arrest as a pretext for the conduct of such a general search for evidence of other crime.[5] Those principles have no applicability here, however, for the only evidence is that the officers' initial intent was to search only for fruits of the earlier crimes, and there is no suggestion whatever that the arrest pursuant to the warrant issued on the basis of the grand jury indictment was pretensive and effected in order to afford the officers an opportunity to search for evidence of other crime.

It is well settled that when the officers in the conduct of a lawful search discover contrabrand or other things subject to seizure. they need not ignore what they discover, though the things discovered were not the things for which they were searching or for which they were entitled to search. The fact the officers here could not have initiated a general search for the purpose of discovering

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[4] Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399.

[5] Lefkowitz v. United States, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877; Paper v. United States, 4 Cir., 53 F.2d 184.

evidence of crimes other than those for which the defendant was arrested does not mean they could not notice or after notice, seize the contraband they discovered in the course of their lawful search, though the contraband had or might have had no connection whatever with the earlier offense which occasioned the arrest.[6]

Of course, the fact that the defendant was lawfully arrested within his home where the search occurred distinguishes this case from such cases as Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed. 2d 1514.

Since the search was lawful, the officers were properly permitted to testify to the presence of the contraband in the house and in the defendant's possession at the time of their lawful execution of the arrest warrant.

Affirmed.

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[6] Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed. 668; Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399; Matthews v. Correa, 2 Cir., 135 F.2d 534; Henderson v. United States, 5 Cir., 206 F.2d 300; Charles v. United States, 9 Cir., 278 F.2d 386.

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October Term, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 622

JONIE GARDNER LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3) is reported at 308 F. 2d 715.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1962. On October 23, 1962, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including

November 28, 1962 (Pet. App. 2). The petition for a writ of certiorari was filed on November 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in denying petitioner's motion to suppress evidence obtained from petitioner's residence incident to his arrest under a warrant.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of North Carolina for conspiring with others to violate the internal revenue laws relating to liquor and a warrant was issued for his arrest. On February 16, 1961, three officers went to petitioner's home to execute the warrant. Two of them, Vassar and Richardson, went to the front door, while the third, Blake, was stationed at the back door to guard against the possibility of escape (R. 2, 14). Petitioner answered the front door and, after the officers had identified themselves and stated their purpose, invited them into the living room (R. 3). There Richardson read the warrant to petitioner, while Vassar, during or immediately after such reading, went to the rear of the house to admit Blake. On the way he observed in plain view in the kitchen three 60-pound bales of sugar and, in another room, two cases of half gallon fruit jars and an additional 20 pounds of sugar (R. 3). On the

way back to the living room after admitting Blake, Vassar tried the door adjacent to the sugar and found it locked (R. 4). In the search of petitioner's person, some keys were found, with one of which the officers unlocked the door near the sugar and discovered a 200 gallon still, not yet completely assembled, one gallon of nontaxpaid whiskey, and associated equipment (R. 4).

As a result of this discovery, a new indictment was returned on April 3, 1961, charging petitioner with unlawful possession of the whiskey, still, and sugar. Petitioner was arraigned on this indictment on February 12, 1962, and the case went to trial on March 8, 1962. On March 7, petitioner filed in the district court a motion to suppress evidence which, according to its date, had been prepared some time before. After a trial before the court (jury having been waived) at which the evidence was developed, the district court denied the motion to suppress on the grounds (a) that it was without merit, and (b) that it was not timely filed under Rule 41 (e) and under a local district court rule which required the filing of motions before arraignment. Petitioner was convicted and sentenced to imprisonment for two and a half years. The court of appeals affirmed the conviction, holding that the motion to suppress had properly been denied on the merits, and that it was therefore unnecessary to decide its timeliness.

ARGUMENT

The ruling of the court below, affirming on the merits the denial of petitioner's motion to suppress, was proper on the facts of this case and presents no issue warranting further review. The action of the officers was reasonable at every step of the way.

It is questionable whether the act of the arresting officers in passing through petitioner's house to admit the officer stationed at the rear door constituted a "search." * Even if it should be so regarded, however, petitioner was already in custody.

As an incident to petitioner's arrest, the officers were entitled to search his person and the premises under his control for the fruits of the crime with which he was charged. *Weeks* v. *United States*, 232 U.S. 383; *Agnello* v. *United States*, 269 U.S. 20. The warrant for petitioner's arrest alleged liquor violations. The location of the locked room adjacent to the sugar and jars gave the officers every reason to believe that if the fruits of any earlier crimes were in the house they would be in that room. It was therefore proper for them to search the room. There was no general rummaging through petitioner's personal papers or personal effects. Indeed, the

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* It may be added that the officers, of course, were not required to ignore what was plainly before them. *Marron* v. *United States*, 275 U.S. 192; *United States* v. *Lee*, 274 U.S. 559.

search was less intensive than those upheld in *United States* v. *Rabinowitz*, 339 U.S. 56 and *Harris* v. *United States*, 331 U.S. 145.

Since the entry upon the premises was warranted, and the ensuing search valid, the officers had the right to seize property the possession of which was illegal, even though they were not aware that such property was on the premises when the search was initiated. *Harris* v. *United States*, *supra*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

JANUARY 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JONIE GARDNER LEE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JONIE GARDNER LEE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER

Counsel for Petitioner respectfully submits this Supplemental Memorandum in reply to Memorandum for Respondent, filed herein.

Petitioner, through his Counsel, has heretofore submitted to this Court that the real question involved herein was as follows:

"Did the District Court and the Circuit Court of Appeals for the Fourth Circuit, so interpret Rule 41(e) and Local Rule 3, in their respective capacities, as to deprive petitioner of his Constitutional rights against wrongful and unreasonable trespass and seizure of his private property, at his place of residence, without first

obtaining a search warrant, thereby violating the Fourth Amendment to the Constitution of the United States, and thereby depriving petitioner of his right to be free from such trespass?" Petition, p. 2, ¶ 2.

The memorandum filed by the Respondent failed to meet, by substantial argument or citation, the argument and authorities therefor submitted by Petitioner on pages 4, 5, and 6 of his petition for certiorari.

As set forth fully in Petitioner's request for certiorari, the District Court rejected, and refused to consider as timely filed, Petitioner's motion to suppress the unlawfully seized evidence taken from his private residence without a search warrant, although said motion was filed in strict conformity to Rule 41(e) of the Rules for Criminal Procedure adopted by this Court to control criminal procedures in all of the Federal Courts of the United States.

It was obvious error for the District Court to hold that the motion to suppress was not filed on time, when the record showed that it was filed before arraingment for trial—which is all that is required by Federal Rule 41(e). Local Rule 3 was treated as effective when, on its face, it is contradictory of and contravenes said Rule 41(e), thereby giving to the District Court Rule, Local Rule 3, superiority over Federal Rule 41(e). (See page 5 of Petition for Certiorari.)

It was also obvious error for the District Court to render a decision upon Petitioner's motion to suppress and at the same time to reject said motion on what was determined by the District Court's Order as a ruling "on the merits". How could Petitioner's motion to suppress be rejected, as not timely filed and then adversely considered by the District Court judge as though it had been received and acted upon after a judicial hearing?

Counsel for Respondent suggests in his brief that it was unnecessary to urge the question of timeliness since

the motion was denied on its merits. No authority is cited for this inconsistent action, and we submit that it was obviously a deprivation of Petitioner's right to have his motion to suppress fully considered and acted upon in a proper and judicial manner in conformity with Rule 41(e) of this Court.

Counsel for Respondent, in his Memorandum (page 4, paragraph 1), makes a statement which demands attention. He says that:

> "It is questionable whether the act of the arresting officers in passing through petitioner's house to admit the officer stationed at the rear door constituted a 'search'. Even if it should be so regarded, however, petitioner was already in custody."

We do not think it "questionable" at all, since the search was made by agents of the Respondent by a forcible search of Petitioner's person and the procurement of keys from his pockets after such agents had gone through his premises to determine what additional search and seizure they might be able to make while there, in and on Petitioner's premises.

There is no dispute that Petitioner had already been arrested and was not resisting in any way the lawful acts of the agents of respondent; nor is it denied that his keys were forcibly taken from his person and against his will, and that immediately thereafter they were used to open a room in his private residence and his private property seized and used as evidence to convict him.

It should be noted that the last sentence of the above-quoted paragraph 2, page 4, of Respondent's Memorandum states that, even if the above actions of the defendant's agents could be treated as a "search", this would not be significant, since "petitioner was already in custody". Petitioner's counsel respectfully submits that this statement

is not only erroneous in law, but is an aggravation of the search and seizure.

Certainly Petitioner's being in custody, under a legal arrest by the agents of respondent, could not justify taking advantage of this arrest to treat custody of petitioner as giving to Respondent's agents a right to go through his private property, where he lived with his family, in the manner described in the record before the District Court, the Fourth Circuit Court of Appeals, and in petitioner's statement of facts herein. (See Petitioner's Statement of Facts, in his Petition, pages 3 and 4.)

Counsel for Respondent in the Memorandum filed in this Court states that the actions of the agents of Respondent were justified under the authority of *Weeks* v. *United States*, 232 U.S. 383; and *Agnello* v. *United States*, 269 U.S. 20.

We submit that a thoroughgoing study of these citations will show that they do not support the contentions made as to their effect upon a case similar to the present case. There are many distinctions to be drawn between parts of the *Weeks* case and the *Agnello* case, when they are compared with the case at Bar.

Counsel for Respondent in their Memorandum also cite, at page 5, the case of *United States* v. *Rabinowitz*, 339 U.S. 56; and *Harris* v. *United States*, 331 U.S. 195.

The *Rabinowitz* case is easily distinguishable from the case at Bar, since that case involved a search of a room used by the defendant as an office where the public could call, and not a private residence restricted to the use of his family who made their home therein. This was a distinction drawn by this Court.

To summarize the opinion in the *Rabinowitz* case; the right to search without a search warrant is based solely on a necessity to guard against some threat by defendant

either to resist, to conceal assets or to remove property from its present status. See paragraph 4, Petitioner's Petition for Certiorari, page 10.

Further referring to the case of *Harris* v. *United States*, 331 U.S. 145; that decision was arrived at on account of a finding by the Court of Appeals that the search complained of was "not a general exploratory search". Here, it seems it would have been impossible to make a more exploratory search of petitioner's premises, than was made; since Respondent's agents seized and used keys, obtained by force, to search a room, which they entered with said keys against the will of Petitioner—said room being part of the private residence of Petitioner and his family and the only room not previously explored from front to rear.

The Respondent's counsel, in their Memorandum, also cite the case of *Agnello* v. *United States*, 269 U.S. 20. In the *Agnello* case, a search and seizure of a defendant's office was declared valid, as the defendant was then committing a crime in the presence of the agents of the Government.—No such conditions existed here.

SOME RECENT RELEVANT CASES NOT HERETOFORE CITED

In *McDonald* v. *United States*, 335 U.S. 451, agents of the defendant forced their way into a portion of his premises and made an arrest for book-making, believing that the defendant was operating a book-making joint and basing such belief upon what they thought was the noise from the operation of a typewriter. The right to make such a search and seizure without a search warrant was denied by this Court in a strong opinion by Associate Justice Douglas, from which we quote:

> "This guarantee (the 4th Amendment) of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It means the right of privacy, as one of the unique values of our civilization

> and with few exceptions stays the hands of the police, unless they have a search warrant".

The more recent cases which should be considered and reviewed, which support the Petitioner's application for certiorari, include the case of *Roth* v. *United States*, 354 U.S. 476; *Davis* v. *United States*, 328 U.S. 582 (Fourth Circuit Court of Appeals); *Marcus* v. *United States*, 367 U.S. 717. We urge that these more recent cases condemn such seizures and searches as involved in the pending case, and justify the Court's acting favorably to Petitioner's request for certiorari.

In an opinion by the Fourth Circuit Court of Appeals, before Judges Boreman, Bryan, and Bell, Case No. 8543, decision dated November 5, 1962, that Court rendered a decision with a legal effect very different from that rendered in the case at Bar against Petitioner showing a development of the law, and the growth of a more and more solicitous attitude to the rights of the citizen. We quote from page 21 of the published decision of the Fourth Circuit Court, in the case of *United States* v. *Peisner*:

> "Bearing in mind the constitutionally protected freedom of expression as guaranteed by the First Amendment, and the constitutionally protected right of the people to be secure in their 'papers and effects' against unreasonable searches and seizures as guaranteed by the Fourth Amendment, we reach the conclusion that here the requisite standard of probable cause for the search, seizure and arrests was not met. To repeat for emphasis, *Government* is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected expression. *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, supra."

Petitioner's prayer for certiorari herein urges that the search and seizure in his case show serious departures from the above principles guaranteed by the 4th Amendment. In Petitioner's case *probable cause* for the seizure

and search complained of was totally lacking,—was not even supported by the clicking of a typewriter, as in the *Heitner* case.

As will be noted, the *Heitner* case was decided by the 4th Circuit Court of Appeals, just a few weeks after Petitioner's unfavorable verdict and sentence and the decision against him on appeal to said 4th Circuit Court of Appeals.

The above quotation is a terse statement on the rights of the citizen to be protected from unreasonable searches and seizures of his property or papers in his private family home or residence and it certainly supports the numerous decisions of this Court cited in Petitioner's prayer for the Writ of Certiorari, and we submit that the Memorandum in Opposition thereto utterly fails to submit authoritative decisions of this Court to the contrary.

In view of the citations herein and those heretofore cited in the Petition for Certiorari, we again earnestly urge that the Writ of Certiorari should be granted and, upon full consideration of the case, that the indictment against Petitioner be discharged.

Respectfully submitted,

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